

SUBCHAPTER 7. PROTECTION OF CONFIDENTIAL INFORMATION

7:26B-7.1 Confidentiality claims

(a) Any person required to submit any information pursuant to this chapter which in the person's opinion constitutes trade secrets, proprietary information, specific information regarding an ISRA-subject transaction other than the fact that the ISRA-subject transaction has occurred and the general nature of such transaction, or information related to national security, may assert a confidentiality claim by following the procedures set forth in this subchapter and by paying the appropriate fee pursuant to N.J.A.C. 7:26B-8.1.

(b) Any person asserting a confidentiality claim pursuant to (a) above shall submit two documents to the Department. One document shall be intact including any information which the person alleges to be entitled to confidential treatment. The second document shall be identical to the first and may be a copy of the first except that the alleged confidential material shall be redacted.

(c) The top of each page of the first submission containing the information which the person alleges to be entitled to confidential treatment shall display the heading "CONFIDENTIAL" in bold type, or stamp.

(d) All parts of the text of the first submission which the person alleges to be entitled to confidential treatment shall be underscored or highlighted in a clearly identifiable manner. This manner of marking confidential information shall be such that both the allegedly confidential information and the underscoring or highlighting is reproducible on photocopying machines.

(e) The first submission, containing the information which the person alleges to be entitled to confidential treatment, shall be sealed in an envelope which shall display the word "CONFIDENTIAL" in bold type or stamp on both sides. This envelope, together with the second, redacted submission (which may or may not be enclosed in a separate envelope, at the option of the person), shall be enclosed in another envelope for transmittal to the Department. The outer envelope shall bear no marking indicating the confidential nature of the contents.

(f) To ensure proper delivery, a person shall send the complete package by certified mail, return receipt requested and if necessary hand delivery, at the address specified at N.J.A.C.

7:26B-1.5. The Department will assume no responsibility for packages until they are received.

7:26B-7.2 Access to information; nondisclosure

(a) Until such time as a final confidentiality determination has been made, access to any information for which a confidentiality claim has been made shall be limited to Department employees, representatives, and contractors, whose activities necessitate such access and as provided by N.J.A.C. 7:26B-7.5 and 7.6.

(b) No disclosure of information for which a confidentiality claim has been asserted shall be made to any other person except as provided in this subchapter or as otherwise required by law.

7:26B-7.3 Confidentiality determinations

(a) The Department shall determine that documents, in whole or in part, are subject to confidential treatment based on the following criteria:

1. Whether a person has asserted a confidentiality claim pursuant to this subchapter which has not expired by its terms, been waived or withdrawn;
2. Whether a person has shown that reasonable measures were been taken to protect the confidentiality of the information and that the person intends to continue to take such measures;
3. Whether the information is not, and has not been, available or otherwise disclosed to any other person without the consent of the person asserting a confidentiality claim (other than by subpoena or by discovery based on a showing of special need in a

judicial or quasi-judicial proceeding, as long as the information has not become available to persons not involved in the proceeding);

4. No statute or regulation specifically requires disclosure of the information; and

5. Except for information related to national security, whether the person has shown that disclosure of the information would be likely to cause substantial damage to its competitive position.

(b) The Department shall treat documents for which a confidentiality claim has been asserted as entitled to confidential treatment until the Department acts upon a confidentiality claim and determines otherwise. The Department shall act upon a confidentiality claim and determine whether information is or is not entitled to confidential treatment whenever the Department:

1. Receives a request under N.J.S.A. 47:1A-1 et seq., to inspect or copy such information;

2. Deems it necessary to determine whether information in its possession is entitled to confidential treatment; or

3. Determines for any reason in the public interest to disclose the information to persons not authorized by this subchapter to have access to confidential information.

(c) The Department shall make the determination whether information is or is not entitled to confidential treatment. Within 30 calendar days after its determination that the information is not entitled to confidential treatment, the department shall send written notification outlining the reasons for its determination, by certified mail, return receipt requested, to the person who submitted the information and the information shall become part of the Department's public files unless contested pursuant to (d) below.

(d) A person who wishes to contest a determination by the Department that the information submitted is not entitled to confidential treatment shall, within calendar days after receipt of the Department's written notification, submit evidence to support the person's contention that the Department's initial determination was incorrect. The evidence may include, but need not be limited to, a statement indicating:

1. The period of time for which confidential treatment is desired by the person (for example, until a certain date, until the occurrence of a specified event, or permanently);

2. The measures taken by the person to guard against undesired disclosure of the information to others;

3. The extent to which the information has been disclosed to others, and the precautions taken in connection therewith; and

4. The extent to which disclosure of the information would result in substantial damage to the person, including a description of the damage, an explanation of why the damage would be substantial, and an explanation of the nexus between disclosure and the damage;

(e) Failure of the person to furnish timely comments or exceptions pursuant to (d) above waives the person's confidentiality claim.

(f) A person may submit a written request for an extension to contest the Department's determination pursuant to (d) above. The Department may extend the time limit for submitting comments pursuant to (d) above for good cause.

(g) The Department shall review the evidence and:

1. To the extent that the Department determines that the information submitted is not entitled to confidential treatment, the Department shall send written notification of this determination to the person by certified mail, return receipt requested. The notice shall state the basis for the determination and that the Department shall make the information available to the public on the 14 calendar days after receipt by the person of the written notice; or

2. To the extent that the Department determines that the information submitted is entitled to confidential treatment, the information shall not be disclosed, except as otherwise provided by this subchapter. The Department shall send written notification of this determination to the person by certified mail, return receipt requested.

7:26B-7.4 Disclosure of confidential information to other public agencies

(a) The Department may disclose confidential information to persons other than Department employees, representatives, and contractors only as provided in (b) below or N.J.A.C. 7:26B-7.6.

(b) The Department may disclose confidential information to another state agency or to a Federal agency if:

1. The Department is required by law to disclose the information;
2. The Department receives a written request for disclosure of the information from a duly authorized officer or employee of the other agency;
3. The request sets forth the official purpose for which the information is needed;
4. The Department notifies the other agency of the Department's determination that the information is entitled to confidential treatment, or of any unresolved confidentiality claim covering the information;

5. The other state or Federal agency has first furnished to the Department a written legal opinion from the agency's chief legal officer or counsel stating that under applicable law the agency has the authority to compel the person who submitted the information to the Department to disclose such information to the other agency;

6. The other agency has obtained the written consent of the affected person to the proposed disclosure; and

7. The other agency has adopted regulations or operates under statutory authority that will allow it to preserve confidential information from unauthorized disclosure.

7:26B-7.5 Disclosure of confidential information to contractors

(a) The Department may disclose confidential information to a contractor of the Department if the contract in question provides that the contractor and the contractor's employees, agents and representatives shall use the information only for the purpose of carrying out the work required by the contract, shall not disclose the information to anyone the Department has not authorized in writing, shall store the information in locked cabinets in secure rooms, and shall return to the Department all copies of the information, and any abstracts or extracts therefrom, upon request by the Department or whenever the information is no longer required by the contractor for the performance of the work required by the contract.

(b) Within 30 calendar days after the disclosure of the information, the Department shall notify in writing the person who supplied the confidential information of:

1. Its disclosure to its contractors;

2. The date on which disclosure was made;

3. The name of the contractor to which disclosure was made; and

4. A description of the information disclosed.

(c) Disclosure in violation of this subchapter or the contractual provisions described in (b) above shall constitute grounds for debarment or suspension as provided in N.J.A.C. 7:1-5, Debarment, Suspension and Disqualification from Department Contracting, in addition to whatever other remedies may be available to the Department at equity or law.

7:26B-7.6 Imminent and substantial danger

(a) Upon a finding that disclosure of confidential information would serve to alleviate an immediate and substantial danger to the public health and safety or the environment, the Department may disclose confidential information to any person whose role in alleviating the danger to public health and safety or the environment necessitates that disclosure. Any such disclosure shall be limited to information necessary to enable the person to whom it is disclosed to carry out the activities in addressing the danger.

(b) Any disclosure made pursuant to this section shall not be deemed a waiver of a confidentiality claim, nor shall the disclosure of itself be grounds for any determination that information is no longer entitled to confidential treatment.

(c) Within 30 calendar days after the disclosure of the information, the Department shall notify in writing the person who supplied the confidential information of:

1. Its disclosure;
2. The date on which disclosure was made;
3. The name of the person to which disclosure was made; and
4. A description of the information disclosed.

7:26B-7.7 Security procedures

(a) Submissions to the Department pursuant to this chapter will be opened only by persons authorized by the Department engaged in administering this chapter.

(b) Only those Department employees whose activities necessitate access to information for which a confidentiality claim has been made, shall open any envelope which is marked "CONFIDENTIAL" and is addressed as provided at N.J.A.C. 7:26B-1.5.

(c) The Department shall store all submissions entitled to confidential treatment as determined at N.J.A.C. 7:26B-7.3 in locked cabinets.

(d) Any record made or maintained by Department employees, representatives, or contractors which contains confidential information shall contain appropriate indicators identifying the confidential information.